

FEDERAL COURT OF AUSTRALIA

Chen v Minister for Immigration and Citizenship [2011] FCAFC 56

Citation:	Chen v Minister for Immigration and Citizenship [2011] FCAFC 56
Appeal from:	Chen v Minister for Immigration & Anor [2010] FMCA 950
Parties:	XIAOPING CHEN v MINISTER FOR IMMIGRATION AND CITIZENSHIP and MIGRATION REVIEW TRIBUNAL
File number:	NSD 1796 of 2010
Judges:	BENNETT, NICHOLAS AND YATES JJ
Date of judgment:	21 April 2011
Catchwords:	MIGRATION – whether jurisdictional error in Tribunal’s decision not to call witnesses to give oral evidence – whether jurisdictional error in Tribunal making credibility finding in reasons before assessing other evidence – whether finding of Tribunal was a jurisdictional fact – whether jurisdictional error in Tribunal overlooking evidence in circumstances where Tribunal’s attention was not drawn to the evidence – whether jurisdictional error in Tribunal placing little weight on witness statements provided by relatives of visa applicant because relatives had an interest in the outcome of the proceedings
Legislation:	<i>Migration Act 1958</i> (Cth) s 361 <i>Migration Regulations 1994</i> (Cth) 1.15A
Cases cited:	<i>Hossein Avesta v Minister for Immigration and Multicultural Affairs</i> [2002] FCAFC 121 applied <i>Khan v Minister for Immigration and Citizenship</i> [2011] FCAFC 21 cited <i>Minister for Immigration and Citizenship v SZGUR</i> (2011) 273 ALR 223 applied <i>Minister for Immigration and Citizenship v SZNPG</i> (2010) 115 ALD 303 applied <i>Minister for Immigration and Citizenship v SZNSP</i> (2010) 184 FCR 485 applied <i>Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin</i> (2005) 88 ALD 304 distinguished <i>Minister for Immigration and Multicultural and Indigenous Affairs v SCAR</i> (2003) 128 FCR 553 cited

Minister for Immigration and Multicultural and Indigenous Affairs v SZBEL (2006) 228 CLR 152 cited
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59 applied
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407 cited
SZOHB v Minister for Immigration and Citizenship [2010] FCA 1394 applied
W148/00A v Minister for Immigration and Multicultural Affairs (2001) 185 ALR 703 cited
Waterford v The Commonwealth (1987) 163 CLR 54 applied

Date of hearing:	21 February 2011
Date of last submissions:	24 February 2011
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	58
Counsel for the Appellant:	Mr B Zipser
Counsel for the First Respondent:	Mr T Reilly
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1796 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: XIAO PING CHEN
Appellant

AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGES: BENNETT, NICHOLAS AND YATES JJ

DATE OF ORDER: 21 APRIL 2011

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

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BETWEEN: **XIAO PING CHEN**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
 First Respondent

MIGRATION REVIEW TRIBUNAL
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JUDGES: **BENNETT, NICHOLAS AND YATES JJ**

DATE: **21 APRIL 2011**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 1 This is an appeal from a decision of the Federal Magistrates Court of Australia (Emmett FM), which held that there was no jurisdictional error in the decision of the Migration Review Tribunal (**the Tribunal**) not to grant Mr Jian Hua Sun (**the Visa Applicant**) a Partner (Provisional) (Class UF) visa (*Chen v Minister for Immigration & Anor* [2010] FMCA 950) (**the FM decision**).

2 2 The history of this matter is set out in some detail in the FM decision at [2] and [5]–[16]:

Ms Xiaoping Chen [the appellant] is a citizen of the People's Republic of China ("China") and an Australian citizen since 1999 ... The [appellant] was married to... the Visa Applicant on 18 January 2007 in China and was the sponsor in respect of the [Visa] Applicant's Subclass 309 Spouse visa application.

...

On 23 July 2007, the [appellant] and the Visa Applicant's migration agent lodged an application for a Spouse Migration (Subclass 309) visa for the Visa Applicant. By letter dated 23 July 2007, the migration agent provided various forms and documents

in support of the visa application.

The Visa Applicant was born in China on 25 February 1962. The Visa Applicant and the [appellant] married on 18 January 2007 in China. The Visa Applicant was previously married, divorcing on 30 June 1999. The Visa Applicant is a citizen of China. The Visa Applicant has a daughter born in China on 18 March 1993 and a son born in China on 18 March 1993. The Visa Applicant's application also includes his 2 children. The children's applications are entirely dependent on the success of the Visa Applicant.

The [appellant] was born in China on 21 November 1957 and became an Australian citizen on 2 June 1999. The [appellant] currently resides in Australia. The [appellant] was also previously married in 1982 and divorced on 11 July 2005. The [appellant] also has two children, a son born on 10 April 1984 and another son born on 19 November 1998 from her previous marriage.

In the visa application, the Visa Applicant stated that he first met the [appellant] in Fujian in China in November 2006 and commenced a relationship with her 10 days later. The Visa Applicant and the [appellant] stated that they decided to marry in November 2006 and married in Fujian, China on 18 January 2007.

In a statement in support of the Visa Applicant's application, dated 26 June 2007, the [appellant] stated that she met the Visa Applicant, her husband, through the introduction of a friend and her sister in law. The [appellant] stated that in November 2006 she went to China to see the Visa Applicant. The Visa Applicant and the [appellant's] sister-in-law met the Review Applicant at the airport in China and they had dinner together that night. The Review Applicant stated that the next day the Visa Applicant invited her for a walk and during her stay for the next two weeks "put aside his own business and accompanied (sic) me everyday". The Visa Applicant became her "boy friend after two weeks". The [appellant] stated that when she returned to Australia she kept in contact by phone frequently and that, in 2007, the Visa Applicant proposed to her. The [appellant] stated she sold the seafood shop business she had with her ex-husband on 31 December 2006. The [appellant] stated that she then returned to China where she and the Visa Applicant were married in January 2007. The [appellant] stated that she returned to Australia to take care of her youngest son who is still in primary school in Australia. Thereafter, the [appellant] and the Visa Applicant have lived separately in two countries, although the Visa Applicant has visited the [appellant] in Australia and sends her money from China "to afford my daily expenses".

In support of his visa application, the Visa Applicant provided a statement, dated 3 July 2007, in which he stated that he met the [appellant] in November 2006 through the introduction of a friend of his and the [appellant's] sister-in-law. He stated that at first he and the [appellant] contacted each other by telephone. He stated that in November 2006 the [appellant] came to China to spend her holiday and it was during that time they came to love each other. The Visa Applicant stated that at the end of 2006 he proposed to the [appellant] not long after she returned to Australia. He stated that they married in China in a simple ceremony and that the [appellant] returned to Australia because of her job there and to take care of her children. He stated that they contact each other by telephone.

On 24 July 2007, the Visa Applicant and his twin children signed a Form 956 authorising their migration agent to be their authorised recipient.

The friend who introduced the Visa Applicant and the [appellant] and the

[appellant's] sister-in-law both provided statutory declarations in support.

On 8 August 2007, the Australian Visa Office, Shanghai, wrote to the Visa Applicant acknowledging receipt of his visa application. The letter provided information to the Visa Applicant about the making of his visa application and invited him to send various documents. The letter also advised the Visa Applicant that any documents in languages other than English must be accompanied by an English translation.

On 5 September 2007, the Delegate in Shanghai emailed the Visa Applicant's migration agent to inform her that telephone interviews would be conducted with each of the Visa Applicant and the [appellant] on 6 September 2007. The interview was rescheduled a couple of times and finally took place on 25 September 2007.

On 30 June 2008, the Delegate refused the Visa Applicant and his children the visas for which they had applied.

The Delegate accepted that the [appellant] and the Visa Applicant were legally married on 18 January 2007 in China. However, the Delegate was not satisfied that they met the criteria set out in Reg. 1.15A of the Migration Regulations 1994 (Cth) ("the Regulations") for the grant of the visa. The Delegate found the evidence of the social aspects of the relationship to be "sparse". The Delegate found that, although there was some evidence of telephone and written communications, the evidence was "minimal". The Delegate found that the communication between the [appellant] and the Visa Applicant was not of the level that one would expect to see in a genuine relationship, especially considering that the [appellant] and the Visa Applicant have been apart for the majority of their relationship. The Delegate found that there was limited evidence of the couple's commitment to each other. The Delegate found that the [appellant] and the Visa Applicant had not demonstrated "a degree of commitment to each other consistent with their being in a genuine and continuing spouse relationship".

3 3 The decision of the delegate of the Minister, refusing the visa, was made on 30 June 2008. The appellant applied to the Tribunal for review and the Tribunal hearing took place on 23 July 2009, at which the Visa Applicant gave evidence by telephone from China. A transcript of the start and end of this hearing was in evidence before the Federal Magistrate.

THE TRIBUNAL DECISION

4 4 The only subclass of the visa class that was relevant to the Tribunal decision was the Subclass 309 (Spouse (Provisional)) visa. The Visa Applicant claimed to satisfy cl 309.211 and 309.221, that is, that he was the "spouse" of the appellant at the time of the application for the visa and at the time of the Tribunal decision. The Tribunal found that he did not meet these criteria as it was not satisfied that there was a genuine spousal relationship between the Visa Applicant and the appellant, having regard to the matters in reg 1.15A(3) of the *Migration Regulations 1994* (Cth) (**the Regulations**). Accordingly, the visa had to be refused: see s 65(1)(b) of the *Migration Act 1958* (Cth) (**the Act**).

5 The Tribunal explained the basis for its decision. It noted inconsistencies in the evidence of the appellant and the Visa Applicant and a lack of evidence of joint ownership of assets, pooling of financial resources and cohabitation. It found that the appellant and the Visa Applicant were not witnesses of truth, and had created their claims in order to obtain the visa. The Tribunal found that they had not resided together briefly as husband and wife in China as they had claimed and, on balance, that at both the time of the application for the visa and the time of the Tribunal decision the Visa Applicant and the appellant did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal was not satisfied that their relationship was genuine and continuing, as required by regs 1.15A(1)(b)(i) and (ii) of the Regulations.

6 The Tribunal said that it did not give weight to a letter that had been sent to the Department of Immigration and Citizenship claiming that the marriage was contrived. It did, however, put the contents of that letter to the appellant, who responded to it (cf *Khan v Minister for Immigration and Citizenship* [2011] FCAFC 21).

THE FM DECISION

7 In the application for review, the Federal Magistrate found that the Tribunal decision was not affected by jurisdictional error and was, therefore, a privative clause decision with which the Federal Magistrates Court had no jurisdiction to interfere. Her Honour dismissed the application with costs.

8 To the extent that the grounds of appeal in this Court reflect the grounds of the application for review in the Federal Magistrates Court we shall refer to the FM decision with respect to each ground of appeal.

THE GROUNDS OF APPEAL

Ground 1: The failure to call witnesses to seek to adduce evidence which may have been relevant

9 The appellant brought three witnesses to the Tribunal hearing. The Tribunal decided not to take evidence from the witnesses. The Tribunal set out its reasons for this decision:

The Tribunal asked the [appellant] through her migration agent the nature of the

evidence to be presented by these witnesses and was informed that they were to give character evidence about the [appellant]. As all had provided statutory declarations to the Tribunals [sic] and as the migration agent indicated there was no new evidence to be placed before the Tribunal by those witnesses, the Tribunal indicated that it would not be necessary for those witnesses to reaffirm orally the evidence in their written declarations.

10 10 The appellant's main submission under this ground of appeal is that the Tribunal, as an inquisitorial body, has an obligation to call witnesses if it has concerns about the nature of a relationship and is reasonably of the view that the witnesses can give relevant evidence. The appellant says that the Tribunal was obliged to take the opportunity to test or develop or obtain further information from the witnesses to work out whether it should accept those witnesses or not. Failure to do so, the appellant says, constitutes procedural unfairness or jurisdictional error.

11 11 The appellant relies on *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* (2005) 88 ALD 304 and submits that the reasoning of the Full Court applies to this case.

The decision in Maltsin

12 12 In *Maltsin*, the principal issue before the Tribunal was whether the particular visa applicant was Mr Maltsin's "spouse" within the meaning of reg 1.15A of the Regulations. The Tribunal had concluded that the relationship between them did not meet the description in that regulation and confirmed the delegate's decision. The Federal Magistrate had concluded that there was a denial of procedural fairness before the Tribunal.

13 13 Justices Kenny and Lander (with whom Spender J agreed) pointed out that the provisions of Part 5 of the Act, including s 361(3), emphasise that the Tribunal's process is essentially inquisitorial in nature (at [36]). Their Honours also pointed out that only the Tribunal can examine a witness whose oral evidence the Tribunal has determined to obtain. Their Honours accepted at [37] that the Tribunal does not err if, notwithstanding that an applicant wants oral evidence to be obtained from persons, the Tribunal decides not to obtain such evidence. That is so even in circumstances where, as in *Maltsin*, notice had been given by an applicant under s 361(2) of the Act and the Tribunal had acted in conformity with s 361(3).

14 14 Sections 361(2) and 361(3) provide that:

- (2) *The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.*
- (3) *If the Tribunal is notified by an applicant under subsection (2) or (2A), the Tribunal must have regard to the applicant's notice but is not required to comply with it.*

15 15 In this circumstance, their Honours said at [37] that *'there is no obligation on the Tribunal to take oral evidence from anyone other than the applicant'*.

16 16 However, their Honours continued to discuss the fact that the Tribunal must genuinely apply its mind to the contents of the notice and, in particular, to the question whether it should take the oral evidence of nominated individuals in accordance with an applicant's wishes. This was in the context of the Tribunal's obligation where the invitation to appear before it is *'real and meaningful and not just an empty gesture'*. Their Honours said at [38] that the Tribunal must take account of such matters as the relevance and potential importance to the outcome of the review of the evidence that could be given by a nominated witness, the sufficiency of any written evidence that has already been given by a witness and the length of time that would afford the applicant a fair opportunity to put his or her case before the particular Tribunal.

17 17 The question in *Maltsin* was whether or not the Tribunal had given genuine consideration to the notice given by Mr Maltsin under s 361(2) to take evidence from the prospective witnesses. The Tribunal had asked Mr Maltsin's representative *'about the value of the evidence'* of the prospective witnesses but, before receiving an answer, the Tribunal made it plain that it did not have sufficient time to hear much more than the evidence of Mr Maltsin and the visa applicant. The answer to the question was that the proposed witnesses' evidence was *'pretty much the same'* as that of other witnesses to be called. The Minister relied on the fact that Mr Maltsin's representative apparently accepted the course proposed by the Tribunal member (at [41]). However, their Honours did not accept that it was clear that the representative was agreeing to a review in which some of the witnesses would not be permitted to give oral evidence.

18 18 The Tribunal came to a conclusion that the evidence before it appeared to disclose *'a web of deceit'* amongst Mr Maltsin's family and social connections and that it

could not be satisfied that such people were ‘*witnesses of truth*’ in the matter. It concluded that there was ‘*insufficient credible and reliable evidence*’ that there was a genuine and continuing relationship between Mr Maltsin and the visa applicant.

19 19 Justices Kenny and Lander concluded that the Tribunal had breached s 361(3) and the rules of procedural fairness such that the decision was infected with jurisdictional error. It was important in their Honours’ consideration that Mr Maltsin had given written notice to the Tribunal that he wanted it to take oral evidence from himself and four other people, all of whom attended the hearing. The Tribunal had heard the oral evidence of only two of the people that Mr Maltsin had named in the notice. The Tribunal did not hear oral evidence from at least one other person who attended the hearing with Mr Maltsin, apparently for the purpose of giving evidence (at [34]).

Consideration of ground 1

20 20 In *Maltsin*, as in the present case, the Tribunal’s own time constraints affected the decision to call the witnesses to give oral evidence. However, in the present case, crucially, the Tribunal accepted the evidence of the witnesses, whereas in *Maltsin* it did not take oral evidence from those witnesses and then found them to be deceitful.

21 21 It is important to understand that the decision in *Maltsin* concerned the Tribunal’s obligations under s 361(3) when a notice is given under s 361(2). This was in the context of Kenny and Lander JJ’s reiteration of the Tribunal’s right to control its inquisitorial function. No such notice was given by the appellant in this case.

22 22 Accepting that the Tribunal in the present case was obliged to have regard to the evidence of the witnesses that the appellant brought to the Tribunal hearing, it cannot be said that the Tribunal failed to do so. It received information that the evidence those witnesses wished to give was the same as in their written statements. It referred to that evidence and indeed accepted it as evidence that those witnesses did and could give, as in the *Minister for Immigration and Citizenship v SZGUR* (2011) 273 ALR 223. The Tribunal’s reasons were sufficient to demonstrate that it had considered the request. It made express reference to the witnesses’ evidence so far as it was relevant. Any criticism on the part of the Tribunal of the way in which it reasoned about that evidence does not disclose jurisdictional

error (*SZGUR* at [33] per French CJ and Kiefel J, with whom Heydon and Crennan JJ agreed).

23 23 As Gummow J said in *SZGUR* at [70] (Heydon and Crennan JJ agreeing):

An inference that the Tribunal did or omitted to do some act in the course of its review, not being a matter which [the Act] requires the Tribunal to set out, should not be drawn lightly.

24 24 It cannot be said, as the appellant submits, that the appellant did not have a real opportunity to give evidence and present argument (cf *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [33]). The Tribunal accepted the evidence. It was in no doubt about it. It was not obliged to ask the witnesses to expand on the evidence (cf *Minister for Immigration and Multicultural and Indigenous Affairs v SZBEL* (2006) 228 CLR 152 at [47]).

25 25 The appellant accepts that the Tribunal is not obliged to accede to a request that witnesses who are present and have provided written statements be called to give further evidence but submits that the Tribunal failed to give genuine consideration to whether or not to call these witnesses. A reading of the transcript set out in the FM decision at [46] makes it clear that the Tribunal did give this real and genuine consideration. The migration agent's response to the Tribunal question about the nature of their proposed evidence was that it would merely repeat what was in their statements. It is a fair reading of the transcript that this was the primary reason why the Tribunal did not call them.

26 26 As Emmett FM said at [57]–[58]:

A fair reading of the transcript [of what occurred at the Tribunal hearing] makes clear that the Tribunal specifically turned its mind to the nature of the evidence that these witnesses would give and was satisfied that any oral evidence would be confined to the matters already referred to in their declarations.

... [T]he transcript makes clear that, far from it being put to the Tribunal that the witnesses may have further evidence to give, the migration agent confirmed that they did not.

27 27 The appellant was unable to point to questions that the Tribunal should have asked the witnesses, whose evidence went to their own perceptions of the relationship between the Visa Applicant and the appellant. If, at the time of the hearing, the Tribunal had

not formed its own conclusions as to that relationship, it is hard to know what should have been put to the witnesses. It was not obliged to put its reasoning process.

28 28 It was for the appellant to make out her case. The Tribunal has no general obligation to call witnesses. The Tribunal's obligation may have been affected by a notice given under s 361(2) but no such notice was given.

29 29 The failure to call the witnesses did not, in the circumstances, give rise to procedural unfairness or jurisdictional error.

Ground 2: Did the Tribunal fail to have regard to supporting material in coming to its conclusions?

30 30 The appellant criticises the structure and language of the Tribunal's reasons. She says that the Tribunal was not entitled to make the initial finding that both the appellant and Visa Applicant were not witnesses of truth and then use this finding by giving it more weight than the evidence of the supporting witnesses and the documentary evidence.

31 31 There is no error in first making a finding on credibility. As Gleeson CJ said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [14]:

Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole.

(see also *Minister for Immigration and Citizenship v SZNSP* (2010) 184 FCR 485 at [33])

32 32 There is no reason why these principles do not apply. As a matter of structure, the Tribunal recorded its finding regarding credibility before dealing with some of the events supported by the documentary material. The Tribunal accepted that those events, such as the phone calls, trips to China, payments of money and meeting with each other's family had occurred, but did not accept that, together, they established a spousal relationship within the requirements of reg 1.15A.

33 The Tribunal must set out its findings in some sequence. There is no error, as a matter of structure, in putting the conclusion first, as long as the reasons are set out, which they are. As in *S20/2002*, the inference that the Tribunal failed to have regard to corroborative material does not arise just because of the sequence of findings.

34 The appellant submits that the Tribunal had already reached a conclusion before considering the supporting material. However, the Tribunal accepted the supporting material as valid, which went, so far as the documentary material was concerned, to factual matters. It simply gave less weight to that material than to the view it had formed in coming to a conclusion as to the nature of the relationship.

35 We do not accept that the Tribunal's decision record shows, as a matter of structure and language, that it arrived at its findings on credibility without considering the totality of the material before it. However even if the Tribunal did not consider the corroborative material until after reaching its conclusions on credibility, there is no error (*S20* at [49]; *SZNSP* at [34]; *SZOHB v Minister for Immigration and Citizenship* [2010] FCA 1394 at [21]).

36 Federal Magistrate Emmett accepted at [88] of the FM decision that '*expressions of conclusions in a particular sequence do not indicate a failure to consider the evidence as a whole*'. There was no error in her Honour doing so.

37 We agree with the conclusion in the FM decision at [70]–[71] to the effect that the Tribunal gave more weight to the impression it formed from the evidence of the appellant and the Visa Applicant. It had regard to the other matters but was not persuaded by them. This does not give rise to jurisdictional error. The appellant does not succeed on this ground of appeal.

Ground 3: No basis for findings on credit

38 The Tribunal did not accept that the appellant and the Visa Applicant were witnesses of truth based on what it found to be inconsistencies in the evidence they had given. These inconsistencies related to four matters, namely: (a) when the appellant and the Visa Applicant became engaged to be married; (b) the custody arrangements for the Visa Applicant's children; (c) the living arrangements of the Visa Applicant's children; and (d) the

Visa Applicant's family members whom the appellant had met. The appellant submits that the four matters in respect of which the Tribunal found the appellant's and the Visa Applicant's evidence to be inconsistent do not provide a sufficient basis for the Tribunal's findings on credit.

39 In this connection, the appellant's written submissions give a stepwise analysis of why it should be found on this appeal that each finding by the Tribunal of inconsistency provides only a "slight" or "tenuous" basis for the findings on credit. Properly considered, however, this analysis really amounts to no more than reasons why a different decision-maker might have taken a different approach or come to a different conclusion on credit to the one reached by the Tribunal.

40 In our view, Emmett FM did not err in concluding (at [103]) that it was open to the Tribunal to form an adverse view of the appellant's and Visa Applicant's credit based on the matters to which the Tribunal referred. A finding on credibility is the function of a primary decision-maker par excellence (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67]). It is also to be remembered in this regard that the Tribunal's finding was based on the cumulative effect of the matters to which it had referred (*W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703 at [69]).

41 Apart from its overall submission concerning the sufficiency of the evidence to support the credibility findings that were made, the appellant submits that the Tribunal's finding that inconsistent evidence was given by the Visa Applicant about the custody of his children was erroneous as a matter of fact-finding.

42 This ground can be dealt with shortly:

- The Tribunal (in [107] of its decision record) set out the factual matters on which it based its finding that inconsistent evidence had been given.
- It was open to the Tribunal, on the factual matters it had set out, to conclude that the evidence provided by the Visa Applicant concerning the custody of his children was inconsistent.

- • The finding was one of fact and reached by weighing the evidence before the Tribunal.
- • If there was an error, it was an error within jurisdiction. There is no error of law simply in making a wrong finding of fact (*Waterford v The Commonwealth* (1987) 163 CLR 54 at 77; *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303 at [20]).
- • The finding of inconsistent evidence was only one of four findings to the same effect and not critical to the Tribunal's conclusion. It was not a jurisdictional fact.
- • This finding was one of the reasons why the Tribunal found that the Visa Applicant was not a witness of truth. The appellant submits that a finding on credibility is susceptible of jurisdictional error. Even accepting, without deciding, that there may be jurisdictional error in a finding of credibility, there was in this case evidence supporting the Tribunal's conclusion. The conclusion was a factual finding open to the Tribunal (*Hossein Avesta v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 121 at [13]).

43 43 There are two incidental matters to which we should refer.

44 44 First, as part of its overall submission, the appellant also submits that, where the Tribunal made a finding that the Visa Applicant and the appellant were not witnesses of truth, it was also required to make a finding of what constituted the truth. There is no such obligation. The Tribunal's finding that there were inconsistencies in the evidence of both the appellant and the Visa Applicant was a sufficient basis for the finding on credibility.

45 45 Secondly, the appellant criticises [110] of the Tribunal's reasons where it said:

The Tribunal is satisfied that the [V]isa [A]pplicant and the [appellant] are not witnesses of truth. The Tribunal is satisfied that they have created their claims in order to obtain the visa sought.

The appellant submits that there was no reason given for the finding in the second sentence of [110]. The second sentence is clearly a conclusion that flowed from the first sentence. It was a conclusion available to the Tribunal on that basis. However, it was not necessary for the Tribunal's ultimate conclusion on the nature of the relationship for the purposes of reg 1.15A and does not amount to a jurisdictional fact.

46 46 The appellant has not demonstrated jurisdictional error on this ground.

Ground 4a: Did the Tribunal overlook or fail to have regard to certain phone records?

47 47 The Tribunal referred to records of phone calls between the Visa Applicant and the appellant in its reasons as follows:

In relation to evidence of continued contact during periods of separation, a few cards and envelopes have been provided along with used phone cards. The [V]isa [A]pplicant's phone records have been provided for March to June 2009 showing two calls to the [appellant] in March, three calls in April, one in May and one in June 2009.

48 48 The Tribunal did accept that the evidence, including the phone records to which it had regard, established continued contact between the parties.

49 49 It is common ground that the Tribunal failed to mention in its reasons a number of phone calls that had taken place from November 2006 to February 2007 and from July to August 2009. That affected the range of months for which there was a record of telephone contact. The Tribunal also failed to note that a number of the phone calls in July 2009 were of long duration.

50 50 Neither the appellant, nor the Visa Applicant, nor the migration agent drew the Tribunal's attention in any way to the phone records. They were simply forwarded to the Tribunal under a general covering letter without explanation. There was no submission made to the Tribunal that it should focus on the length of the phone calls. If the appellant or the Visa Applicant had thought that they were of significance, they would or should have drawn them to the Tribunal's attention.

51 51 In any event, it does not follow, logically, that the length or number of phone calls establishes a genuine spousal relationship. For example, the lengthy phone calls were made immediately prior to the hearing before the Tribunal at which the Visa Applicant gave evidence by telephone from China. Even if an inference were able to be drawn from the phone records, failure to do so does not constitute jurisdictional error (*SZNP*G at [28]). It cannot be said that such failure amounted to a failure to consider the claims. At most, the phone records could be said to have been evidence in support of the claim to a genuine spousal relationship.

52 52 Federal Magistrate Emmett came to that conclusion at [77]–[84] of the FM decision. We see no error in her Honour’s reasoning.

Ground 4b: Did the Tribunal err in placing little weight on the witness statements provided by relatives of the Visa Applicant or the appellant on the basis that they “have an interest in the outcome” of the Visa Applicant?

53 53 This was also raised before Emmett FM. Her Honour at [69] of the FM decision did not ‘*accept the submission of the [appellant’s] counsel that the only reason that the Tribunal placed little weight on those statements was because they were relatives or persons with an interest in the outcome*’.

54 54 Her Honour concluded at [70] – [71] that:

The Tribunal made clear that it gave more weight to the impression it formed of the relationship from the evidence given to it by the [appellant] and the Visa Applicant in assessing their credibility.

However, in considering whether the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship, a fair reading of the Tribunal’s decision record makes clear that it also had regard to other documents provided, but was not persuaded by them. Further, the Tribunal’s decision record makes clear that it gave consideration to the statutory criteria in reg 1.15A(3) of the Regulations...

55 55 Her Honour said that the statements of the relatives were not the sole reason that the Tribunal was not persuaded. Her Honour did not accept that the Tribunal expressed its doubt in respect of the statements to be based only on the fact that they were relatives. The Tribunal did no more than note that fact.

56 56 The appellant accepts that if her Honour’s reasoning was correct, there was no jurisdictional error on this basis. We are of the view that the reasoning was correct.

57 57 The reference to the fact that some of the witnesses were relatives was part of the reasoning process of the Tribunal. It had no obligation to put its reasons for placing less weight on the evidence to those witnesses. It is not a case, as in *Maltsin*, where the Tribunal made actual findings about the veracity of the witnesses. It simply preferred its own view of the nature of the relationship, based on its observations of the Visa Applicant and the appellant and its conclusions as to their evidence. Even if the Tribunal’s reasoning on this basis placed insufficient weight on the witnesses’ evidence, it cannot be said that it was

perverse or irrational to take into account the relationship between the witnesses and the Visa Applicant/appellant.

Conclusion

58 58 The appellant has not established error on the part of the Federal Magistrate. The Tribunal decision was not subject to jurisdictional error. It follows that the appeal should be dismissed with costs.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bennett, Nicholas and Yates.

Associate:

Dated: 21 April 2011